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No. 81-1619

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GEORGIA-PACIFIC CORPORATION,
Petitioner,

v.

LYMAN LAMB COMPANY, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Petitioner Georgia-Pacific Corporation respectfully submits this reply brief in support of its petition for a writ of certiorari to the Court of Appeals for the Fifth Circuit.

This case presents clear and fundamental issues of antitrust law which require this Court's attention. Although respondents seek to frame the issues in terms of sufficiency of the evidence, in fact, other than the slight evidence rule issue discussed in Question 2, this Court need not examine the evidence in order to decide the questions presented by Georgia-Pacific's petition.

I.

CONSPIRACY ISSUES.

Question 1:

Contrary to respondents' suggestion, the issue here is not whether a correctly instructed jury properly could have found a

conspiracy from the evidence presented at trial. Rather, the issue is whether the correct legal standard for inferring an antitrust conspiracy was supplied to the jury by the trial court, and applied by the Fifth Circuit in affirming the judgment.

Even if it is assumed, for purposes of argument only, that the evidence was sufficient to support the verdict under a *correct* instruction of the law of conspiracy (had one been given), it is impossible to tell whether or not the jury reached its finding based upon evidence of anything more than conscious parallelism plus opportunity contacts. Since "it is impossible to tell which path the jury followed in reaching its verdict," the verdict cannot stand. *Borger* v. *Yamaha Int'l Corp.*, 625 F.2d 390, 398 (2d Cir. 1980).[1] Accordingly, respondents' discussion of the evidence is irrelevant to the question this Court is asked to consider.

Instead of directly addressing this legal issue of the scope of conspiracy law, respondents have resorted to two incorrect characterizations of the record.

First, respondents assert that the jury *was* correctly instructed that evidence of parallel business conduct, combined with opportunity contacts, is not sufficient proof from which a conspiracy may be inferred:

> "This is not a case in which conspiracy was inferred from evidence of parallel business conduct, either alone *or combined with communications affording only an opportunity to conspire. In fact, the jury was specifically instructed*

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[1] *Accord, Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19, 29-30 (1962); *E.I. du Pont de Nemours & Co.* v. *Berkley & Co., Inc.*, 620 F.2d 1247, 1256-57 (8th Cir. 1980); *Hayes* v. *Solomon*, 597 F.2d 958, 985-86 (5th Cir. 1979), *cert. denied*, 444 U.S. 1078 (1980) ("Despite the use of the jury interrogatories, the very real likelihood that the jury may have utilized an unproven or improper theory of liability to reach its verdict mandates reversal"); *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 82 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970).

> *that such evidence is not in itself sufficient* to sustain an inference of conspiracy." (Resp. Br. at 5; emphasis added.)[2]

Under any fair reading of the instructions, this contention is nonsense. While the trial court arguably did tell the jury that neither conscious parallelism alone nor the existence of opportunity contacts alone is enough to support an inference of conspiracy[3], it did *not* explain that the combination of the two is likewise insufficient as a matter of law. The trial court's error of omission was compounded by its instruction that both conscious parallelism and opportunity contacts are pertinent circumstantial evidence of conspiracy. Vol. 56, Tr. 3539-40.

Second, respondents state that "this is not a 'single element' price fixing case." Resp. Br. at 5. This contention is easily answered by review of the Special Verdict interrogatories (Pet.App. I) and the corresponding jury instructions (Pet. Addendum at d-f), from which it is apparent that the only conspiracies charged were with respect to West Coast freight and standard weights. Respondents have never contended until now that any single element of the total price other than freight was artificially raised. This is a true "single element" case, like *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643 (1980).

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[2] *See also* Resp. Br. at 7. The Brief of Respondents in Opposition to Petition for Writ of Certiorari is referred to as "Resp.Br. at ____"; petitioners' Joint Appendix is referred to as "Pet.App. ____"; the Petition for Writ of Certiorari of Georgia-Pacific is referred to as "Petition of Georgia-Pacific at ____"

[3] The instructions were sufficiently ambiguous that the jurors might have concluded that they were free to return a verdict of liability on conscious parallelism *or* opportunity contacts alone. For example:

> "[T]he mere fact that there be opportunity to meet or to agree does not mean that any particular agreement was *or was not* entered. It is merely one part of the total evidence that you will be dealing with." (Vol. 56, Tr. 3538, Addendum to Petition of Georgia-Pacific at b; emphasis added.)

While this instruction fairly told the jury that a finding of conspiracy was not *compelled* by evidence of opportunity contacts alone, the converse was not apparent; *i.e.*, the jurors may have understood that such evidence would suffice if they so chose.

A verdict that the freight element was conspiratorially fixed can only properly be based upon evidence of agreement concerning that element. Under the standards set by the Third and Seventh Circuits in *Venzie Corp.* v. *United States Mineral Prods. Co.*, 521 F.2d 1309 (3d Cir. 1975), and *Weit* v. *Continental Ill. Nat'l Bank & Trust Co.*, 641 F.2d 457 (7th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3695 (Mar. 1, 1982)(No. 81-152) (and now by the District of Columbia Circuit in *Proctor* v. *State Farm Mut. Automobile Ins. Co.*, No. 80-2437 (D.C. Cir., Mar. 16, 1982)), this evidence must consist of more than conscious parallel conduct plus discussions on other subjects showing only an opportunity to conspire on the element in question. The error below consists of the trial court's failure to so instruct the jury, plus the Fifth Circuit's application of a lesser standard of proof than that demanded by the Third, Seventh and District of Columbia Circuits. Respondents' lengthy description of evidence, which at best supports the Fifth Circuit's incorrect legal standard of inferring a conspiracy from "parallel pricing conduct . . . plus the numerous items of direct evidence of communication between high-level personnel on pricing policy" (*In re Plywood Antitrust Litigation*, 655 F.2d 627, 634 (5th Cir. 1981), Pet.App. at A-9), is thus inapposite.

Question 2:

Petitioner adequately preserved its right to raise the "slight evidence" issue to this Court, by objecting at several points in the proceedings below to the sufficiency of the proof tying absent parties to the conspiracies. Vol. 56, Tr. 3571; "Joint Memo. In Support of Motions for J.N.O.V. and a New Trial," pp. 50-51 (Dec. 5, 1978); "Brief of Appellants" to the Fifth Circuit, p. 53 (Aug. 13, 1980). The issue is thus appropriately raised to this Court.[4]

Respondents' contention that "direct, substantial evidence linked the [absent] co-conspirators to the conspiracy" (Resp. Br. at 20) is likewise without merit. As stated in the Petition of Georgia-Pacific at 17, for the vast majority of absent co-conspirators, the linking evidence consisted solely of parallel

[4] Even were there any doubt regarding sufficiency of the objections below, this Court may still consider the issue. *See, e.g., United States* v. *Lovasco*, 431 U.S. 783, 788, n.7 (1977); *Neely* v. *Martin K. Eby Constr. Co.*, 386 U.S. 317, 330 (1967).

conduct.[5] Indeed, since the trial court expressly relied *solely* upon conscious parallel conduct in holding that all of these absent parties were properly included in the conspiracies (Pet.App. at C-3), the issue of whether this unprecedented extension of the slight evidence rule was proper is squarely before this Court.[6]

II.

DAMAGE ISSUES.

Question 3:

Despite respondents' implication to the contrary (Resp.Br. at 10), the jury was not instructed to base its damage findings upon consideration of the *total* delivered price of plywood, including the mill price. Instead, the trial court's special interrogatories and instructions focused only upon freight, the single price element which allegedly was fixed. Respondents' citation of evidence which purportedly demonstrates that delivered prices were raised by the entire amount of the freight "overcharge" is thus irrelevant; the issue is not whether such evidence exists, but whether it was proper to base the damage determination upon consideration of only one element, rather than the total price. Respondents' insistence that the alleged conspiracy increased total delivered prices (Resp.Br. at 11), only underscores the impropriety of the submission of the damage issue to the jury in a manner which permitted consideration of only the single element.

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[5] Apart from legitimate sales agreements among the plywood companies and mere participation at functions of the American Plywood Association—neither of which constitutes "slight evidence" (Petition of Georgia-Pacific at 18 n.10)—there was no evidence of communications and, indeed, no evidence other than conscious parallelism, for nine of 16 defendants with respect to the alleged West Coast freight conspiracy and 23 of 35 defendants with respect to the alleged standard weight conspiracy.

[6] Respondents' assertion that the slight evidence rule "is correct and uniform" (Resp.Br. at 19) is wrong. At least three circuits, including the Fifth, have rejected or modified the rule in recent years. *United States* v. *Malatesta*, 590 F.2d 1379, 1383 (5th Cir.), *cert. denied*, 440 U.S. 962 (1979) (rejected); *United States* v. *Cooper*, 567 F.2d 252, 253 (3d Cir. 1977) (rejected); *United States* v. *Dunn*, 564 F.2d 348, 357 (9th Cir. 1977) (modified to require "sufficient" evidence of knowing participation in the conspiracy).

Respondents' contention that petitioners failed to object below to the submission of the measure of damage interrogatories to the jury (Resp.Br. at 18-19) is incorrect. The issue was properly raised both to the trial court and to the Fifth Circuit. Vol. 56, Tr. 3573; "Brief of Appellants" to the Fifth Circuit, pp. 75-79 (Aug. 13, 1980).[7] Moreover, it is not necessary to propose a specific alternative interrogatory, as respondents suggest, in order to preserve the issue for appeal; it is sufficient to object to the proposed interrogatory prior to its submission to the jury, as petitioners did. *Huddleston* v. *Herman & MacLean*, 640 F.2d 534, 550 (5th Cir.), *modified in part on other grounds*, 650 F.2d 815 (5th Cir. 1981), *petitions for cert. pending* (Nos. 81-680, 81-1076); *Clappier* v. *Flynn*, 605 F.2d 519, 528 (10th Cir. 1979); *Turchio* v. *D/S A/S Den Norske Africa*, 509 F.2d 101, 105 (2d Cir. 1974).

Respondents also mischaracterize petitioners' reliance upon *Boise Cascade Corp.* v. *FTC*, 637 F.2d 573 (9th Cir. 1980) and this Court's opinion in *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643, 649 (1980). Petitioner does not suggest that this Court must assume that the "freight gain" was completely offset by lower mill prices (Resp.Br. at 11); it does suggest that the *opposite* cannot be assumed either, *i.e.* that the "freight gain" was completely absorbed as profit, with the mill price remaining unchanged. *Neither* extreme should be automatically assumed—that is precisely the problem with the measure of damage interrogatories, which assume that one extreme or the other must be correct. *Catalano* recognizes that such all-or-nothing assumptions are improper in a single-element case.[8]

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[7] Section II.C of the petitioners' opening brief to the Fifth Circuit was entitled: "It Was Also Reversible Error To Submit Freight Differentials, Or 'Phantom Freight,' To The Jury As The Measure Of Damages. That Formula May Not Be Used In A Class Action Of This Type And Was Barred By The Law Of The Case."

[8] Respondents' further ground for distinguishing *Catalano*—that "this was not a competitive market" (Resp.Br. at 12)—is specious. Damages in price-fixing cases are measured by comparison of the actual price charged with the hypothetical price in a competitive market; the competitive price thus becomes relevant even when a conspiracy is established. The only proper way to measure damages in this case is by comparing the difference, if any, between actual delivered prices and prices in a "competitive" market.

Question 4:

Having propounded interrogatories which allowed for no intermediate alternative measure between the two extremes offered, the trial court compounded the error by *giving the jury no instructions whatsoever* concerning the appropriate standards for measuring damages in antitrust cases. Specifically, the trial court failed to instruct the jury that damages in a price-fixing case must be based upon the difference between the total price paid and what the total price would have been absent the conspiracy. *See Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 297 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980). It is undisputed that no such instruction was given; the fact is obvious from a cursory review of the instructions. Addendum to Petition of Georgia-Pacific at d-f. Respondents have not addressed this issue. The error in this aspect of the case is so obvious and so fundamental that it alone warrants the grant of certiorari and summary reversal.[9]

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[9] For the reasons explained above, there is no need to discuss the evidence in this case. However, in their zeal to frame the issues in evidentiary terms, respondents unfortunately have resorted to numerous mischaracterizations and misstatements of the record. One (all too typical) example will suffice. At page 9 of their opposition, the respondents state that "Weyerhaeuser and Georgia-Pacific had no legitimate business dealings together *and did not buy or sell plywood to each other,*" (emphasis added) citing, *inter alia*, pages 341 and 451 of the trial transcript. At page 341, the following deposition testimony of Mr. James Tweedie of Weyerhaeuser was read into the record by Harold Kohn, Esq., counsel of record for the respondents in this Court:

"Q. Was Weyerhaeuser buying plywood from Georgia-Pacific at that time?

"A. Some, yes."

And the following testimony of Mr. Tweedie was read at page 451:

"Q. Do you have any knowledge that Weyerhaeuser bought plywood on any basis from Georgia-Pacific?

"A. Not any specific details, but I am aware that they have bought plywood from time to time."

Petitioner does not suggest that the above exchange has any relevance to the questions before this Court. It is cited only as an example of the cavalier manner in which respondents have characterized the record.

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Respectfully submitted,

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